Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-68

IN THE

Supreme Court of the United States

October Term, 1980

CINDY FORET
Appellant

v.

UNITED GAS PIPELINE COMPANY, INC.
Respondent

On Appeal from the United States Court of Appeal, Fifth Circuit, New Orleans, Louisiana

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

HUNTINGTON E. DOWNER
WAITZ, DOWNER & BEST
423 Goode Street
Houma, Louisiana
Attorney for Appellant

MICHAEL J. SAMANIE
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

HERBERT W. BARNES
LAW OFFICES OF MICHAEL J. SAMANIE
525 East Park Avenue
Houma, Louisiana
Attorney for Appellant

SUPPLEMENTAL TABLE OF CONTENTS

APPENDICES

Page

JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA 23

REASONS FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA 24

CERTIFICATE OF SERVICE 34

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CINDY FORET, ETC., ET AL	CIVIL ACTION
VS	NO. 78-4152
UNITED GAS PIPELINE CO.	SECTION "A"

JUDGMENT

Considering the written reasons on file herein, and counsel informing the Court that plaintiff, Foret does not waive any rights or claims against any party or parties, and pursuant to Rule 9 (b), accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Cindy Foret and against Paul C. Crochet, for the sum of $145,557.02.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff, Cindy Foret, individually and as administratrix of the estate of Daniel Foret, against the defendant, United Gas Pipeline Co. be dismissed in its entirety.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third party complaint of United Gas Pipeline Co. against Paul C. Crochet is hereby dismissed.

New Orleans, Louisiana, this 22nd day of Februar-y, 1980.

/s/ NELSON B. JONES
Nelson B. Jones, Clerk

APPROVED AS TO FORM:

UNITED STATES DISTRICT JUDGE

(Filed February 22, 1980)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL C. CROCHET	CIVIL ACTION
VS	No. 78-4151
UNITED GAS PIPELINE CO.	SECTION "A"
CINDY FORET, ET AL	CIVIL ACTION
VS	No. 78-4152
UNITED GAS PIPELINE CO.	SECTION "A"

(CONSOLIDATED MATTERS)

(Filed February 6, 1980)

SCHWARTZ, J.

This matter was tried to the Court, without a jury on a former day, at which time the matter was taken under submission. Now, after due consideration of the evidence adduced at the trial, the arguments and memoranda of counsel, the record and the law, the Court finds as follows:

To the extent that any of the following findings of fact constitute conclusions of law they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

FINDING OF FACT

THE SCENE

The causes of action arise from a collision of a sixteen foot pleasure craft and a piling located near the bank on the eastern side of the intersection of Bayou Chauvin and defendant United Gas Pipeline Company's canal in South Terrebonne Parish, Louisiana.

On November 29, 1950 defendant was granted a right of way from the landowner for the construction of a gas pipeline across Bayou Chauvin. In exercising this right it ran a pipeline known as "Napoleonville 20 inch Line." Defendant built a canal which runs directly above the pipeline for the purpose of maintaining the pipeline. Although the history of the piling involved in the collision is sketchy, it appears to be the remaining part of a "lilly gate." Water lillies grow rapidly in this area and two lilly gates were used to help keep the canal free of lillies which could hamper navigation thereon. Construction of these lilly gates was accomplished by placing a piling at each corner of the intersection of the pipeline canal and Bayou Chauvin. Attached to each piling was a boom which stretched across the canal. The booms were locked shut but company employees were provided with a key, which they used to open the booms, making the canal accessible to them on their periodic maintenance checks.

Approximately fifteen years ago, modern methods of lilly control replaced the use of gates or dams. the pipeline canal was built in 1952 and was originally forty feet wide. However, substantial soil erosion has occurred since that date so that the piling is now approximately 12 to 15 feet from the bank. No records of the building of the lilly gates are extant and there is no evidence as to who built them.

Several of defendant's employees testified regarding the company's policy for maintenance of the pipeline. The employees were instructed to remove obstructions, that is, anything which would interfere with the maintenance of the pipeline or was a hazard to navigation on the canal. Defendant's employees testified that they could not remove anything placed on the property by the landowner without first seeking its

rmission. They never sought permission to remove the pilings nor did they believe same was an obstruction or a hazard to the use of their servitude. The pilings were not marked and appeared to have extended normally from 12 to 18 inches above the water line. United Gas Pipeline Co. was aware that the pipeline canal was used from time to time as a navigable waterway by the public for the purpose of hunting and fishing.

THE ACCIDENT

On the morning of November 29, 1977, Daniel Foret, his father-in-law, Paul Corchet, and a friend, Donald Lambert, went duck hunting in the area surrounding Bayou Chauvin. They traveled in a 16 foot fiberglass boat owned by Lambert and operated at all times relevant hereto by Crochet. The boat was equipped with a 60 h.p. motor and carried three life preservers and flotation cushions. Plaintiff Crochet alleges that approximately 1:00 P.M. the boat was proceeding west on defendant's pipeline canal towards Bayou Chauvin at an estimated speed of 15 to 25 miles per hour when it struck a piling later identified as being on the eastern side of Bayou Chauvin at the intersection with the pipeline canal. Crochet also claims that just prior to the collision he was sitting at the controls in the rear of the boat; Lambert was seated in the bow; and Foret was standing to his left looking for a place to hunt. All passengers in the boat were wearing hip boots and none were wearing life preservers. The weather was overcast and misty.

Crochet testified that he was looking ahead with an unobstructed view but that he did not see a piling, and that Foret, who looked ahead, back and ahead again, suddenly shouted, "Watch out for that piling," whereupon he instantly slowed the boat and swerved

to the left to avoid a group of water lillies which he claimed obscured the piling.[1] As a result of the impact with the piling according to Crochet, all three men were thrown into the water and immediately surfaced. Foret called to him and attempted to help Lambert. Thereafter, Foret and Lambert disappeared below the surface and drowned.

Crochet claimed he was in the water for about ten minutes, then removed his boots and swam to shore. Thereafter he swam across Bayou Chauvin to reach the boat which was grounded on the opposite shore.

Mr. Stuart Scheers, who operates a commercial hunting lease over some 4000 acres near the site of the accident, testified that he and his helper were patrolling his lease for poachers and heard shots coming from the north side of his lease. They followed the sound of the shots and came upon Crochet in an agitated state running the boat more or less aimlessly up and down the pipeline canal. Scheers, after several minutes of conversation with Crochet, learned that two men had drowned. He left his aide at the scene and he and Crochet went to report the accident to the authorities. Thereafter, Scheers and Crochet returned with rescue and investigative officers from local sheriff's office. Deputy Jodi Robichaux and Scheers pulled Foret's body from the water. Scheers stated that the water was no more than five feet deep at the place where the bodies were found. Crochet testified that the men were in the water over their heads when they drowned. Foret's face was damaged and Scheers described the damage as appearing to have been caused by a gunshot

[1] Plaintiff gave a statement (Deft. Ex. 20) to the investigative officers wherein he described the accident. In this statement he does not mention that the water lillies obscured his vision of the piling or that they in any other way contributed to the accident.

wound. Pieces of Foret's lips, chin and eyebrows were missing. Robichaux was not asked any questions regarding the condition of Foret's face nor did he testify regarding such. Lambert's body was retrieved from a spot a few feet away and was not marred in any way.[2]

Scheers further testified that he saw a shotgun, expended shells and dead ducks in the boat. Crochet testified the ducks had been killed earlier in the day when they were hunting from a duck blind. However, no explanation for the expended shells was offered.

THE PILING

Crochet claims that he was unable to see the piling and that it was obscured by water lillies. Defendant's employees who were familiar with the intersection testified that the piling generally protrudes from the water 8 to 12 inches at high tide and 12 to 18 inches at low tide; that they never perceived it as a hazard to navigation; and that barges were easily able to navigate the canal between the pilings. The investigating officers reported the piling when they arrived on the scene to be approximately 18 inches above the water. Scheers testified that 14 to 16 inches of the piling were exposed and he further testified that although there were some lilles along the shore at that time of the year, none were in the area of traffic. Scheers testified that he passed that intersection almost daily for the last several years and does not recall seeing the pilings under water except in extreme weather conditions such as when a hurricane threatens. Photographs (Exhibits 23, 24 and 25) introduced into evidence by plaintiffs show that the piling was approximately 12 inches above the

[2] The autopsy report identifies the damage to Foret's face as resulting from crab bites. Dr. Sidney Warren who performed the autopsies on both bodies testified that he based this explanation of Foret's facial damage on the circumstances of the accident as explained to him by the investigating officers. He further stated that crab bites seemed the most logical explanation at the time. He had no independent recollection of this incident and could not explain why only Foret's face was so damaged and that there was no similar damage to Lambert's body.

water, with no barnacle line showing. A barnacle line is apparent in Defendant's Exhibits 10, 11 and 12. Thus, the best evidence of the height of the piling above the water at high tide is 12 inches.

Although Crochet claims it was high tide at the time of the accident plaintiffs introduced no corroborating evidence indicating at what time of day it was high tide on the date of the accident, and the photographs introduced in evidence do not support his claim of high water. There was credible testimony from other witnesses to the effect that at this particular time of the year, i.e., during the winter season, tides in this area were generally low. In the absence of further proof it would be pure speculation to conclude that the tide in winter or on the date of the accident reached the high water mark indicated by some of the pictures on the bank.

Furthermore, since Foret was able to see the piling it obviously was exposed. Likewise, the moving picture photographs of the accident scene which were viewed by the Court, showed the piling to be above the water and visible from quite a distance.

Thus, the Court concludes that there is no reliable evidence [3] that the piling at the time of the accident was exposed less than 14 to 16 inches and probably was exposed approximately 18 inches as testified to by the investigating officers and as shown by the films taken in winter (Plaintiff's exhibits 20, 21,22). [4]

[3] In addition to Crochet's testimony being at variance with that of other witnesses and physical evidence, other factors in ascribing the weight and effect which has been accorded to his testimony are: the original investigative report includes Crochet's handwritten statement (Exhibit United Gas No.20) reporting that he was approaching the intersection traveling down Bayou Chauvin rather than down defendant's canal; his testimony regarding his unfamiliarity with the area is not consistent with an experienced hunter and fisherman proceeding through a unfamiliar maze of waterways without the benefit of a chart and running the risk of becoming lost, nor is it consistent with his knowledgeable testimony of the area while testifying and explaining Exhibits 4 and 5 (the chart of the area); his failure to explain, if he were in fact looking ahead and traveling at a reasonable rate of speed, why he would be heading through the alleged cluster of water lillies when there was ample space to avoid it; his apparent shock (as reported by Sheers) after the deaths could have colored his recollection of physical conditions and what transpired prior to the accident.

[4] The court rejects the testimony of plaintiff's witness Michael Tivet, the only witness who testified that he had seen the piling under water, as the Court finds his testimony to be lacking in credibility.

The Court is of the opinion that Foret should not have been standing in a small speedboat traveling through unknown waters at a speed of 15-20 miles an hour, wearing hip boots, and without a life jacket. Regardless of whether or not he was required to wear a life jacket prudence indicates that under the circumstances it was reckless of him to expose himself to danger in such a manner.

CONCLUSIONS OF LAW

This cause of action is a maritime tort and is cognizable under the admiralty jurisdiction of this Court. The suit is properly removed from the state courts and venue is proper in the Eastern District of Louisiana.

Plaintiff, in furtherance of his claim alleges that the piling at issue is the proximate cause of this collision and that defendant breached an affirmative duty to remove or mark such hazard to navigation. Defendants deny same and allege that plaintiffs' negligence was the proximate cause of the accident.

Although it has been briefed by the parties, the Court need not address the issue of whether or not the landowner or the defendant as owner of the servitude owed a duty to plaintiffs in this case because we find the piling is not the proximate or legal cause of this collision.

In order for plaintiffs to sustain their burden of proving every element of their claim herein by a preponderance of the evidence, the Court must conclude that defendant has both breached a duty with respect to the piling in question and that such failure was the cause of the accident. The plainfiffs have failed

to prove by a preponderance of the evidence that the piling was not in plain view on the date in question. Having made this determination, it is appropriate to apply the concept of legal cause with respect to the casualty.

In *Spinks v. Chevron Oil Company*, 507 F. 2d 216 (5th Cir. 1975) the Fifth Circuit replaced the concept of proximate cause as applied in maritime tort cases with the modern theory of legal cause. The Court, quoting from the American Law Institute Restatement 2d of Torts, stated:

> "The elements of legal cause are negligence, a causalconnection between the negligence and the injury, the invasion of a legally protected interest, and a lack of a countervailing legally protected interest as a defense to liability. The defendant's negligence must be a substantial factor in bringing about the harm, with no rule of law relieving the actor of fault. 'Substantial' means more than 'but for' the negligence, the harm would not have resulted and more than merely negligible negligence. The gist of it is that some responsibility for the effect must accompany the cause. *Supra*, at P. 223.

Under either a proximate or legal cause analysis, the law requires that the consequences of the risk assumed be generally foreseeably by a reasonable man under similar circumstances; it does not require that the precise chain of events leading to the particular injury in question be foreseeable. *Olympic Towing Corp. v. Nebel Towing Corp.* 419 F. 2d 230 (5th Cir. 1969) cert. den., 397 U.S. 989, 90 S.C. 1120. *Ionmar Compania etc. v. Central of Ga. R. Co.*, 471 F. Supp. 942 (S.D. Ga. 1979).

The evidence in this case does not support the contention that on the date of the accident the piling was a hidden hazard. On the contrary the evidence supports the conclusion that it was open and obvious and could or should have been seen by any person exercising reasonable care. Defendant had the right to expect that anyone making use of its private pipeline canal would proceed at a reasonable speed and see what could be seen. Moreover, since there was more than ample space for any type of vessel, boat or barge that could be used in this canal to pass without striking the piling, defendant could not have reasonably anticipated that someone would strike it. In summary, we find that the sole substantial factor in causing the accident was the negligence of the plaintiff Crochet, and not the defendant's failure to remove or mark the piling.

In addition, we find as noted in the aforesaid findings of fact that Foret failed to exercise reasonable care for his own safety and thus he was guilty of contributory negligence which we assess at 25%. *St. Hillaire Moye v. Henderson*, 364 F. Supp. 1286 (E.D. Ark, 1973), aff'd 496 F. 2d 973 (Cir. 8 1974), cert. den., 419 U.S. 884; *Palmer v. Ribax, Inc.*, 407 F. Supp. 974 (M.D. Fla. 1976); *Griffith v. United States*, 180 F. Supp. 454 (D. Wy. 1960).

During the trial and in pre-trial and post-trial memoranda all parties appear to have neglected to take into consideration that defendant pursuant to Rule 9 (b) tendered plaintiff Crochet as a defendant to plaintiff Foret. Therefore, in view of our conclusions

that Crochet's negligent actions caused the accident, there should be judgment herein in favor of Foret, against Crochet. However, since plaintiff Cindy Foret is the daughter of Paul C. Crochet and both plaintiffs were represented by the same parties, we will presume this claim is waived and/or is not the desired result of our conclusions with respect to Crochet's negligence.

Accordingly, we will not order entry of judgment herein by the Clerk for ten days in order to give plaintiff Foret an opportunity to respond to these observations.

Specifically, we find that Plaintiff Cindy Foret would be entitled to recover as follows:

Loss of income to date of trial	$19,503.52
Loss of future income discounted at 7%	137,572.50
Loss of Society	40,000.00
	$194,076.02
Less plaintiff's contributory negligence of 25%	48,519.00
Total	$145,557.02

If plaintiff Foret does not respond in ten days the Clerk of Court will be ordered to enter a judgment in both proceedings Nos. 78-4151 and 78-4152 dismissing both causes of action at plaintiffs' costs. If plaintiff Foret advises she has not waived her claim against plaintiff Crochet, there will be judgment herein in favor of Cindy Foret against Paul C. Crochet in Proceedings No. 78-4152 in the sum of $145,557.02.

New Orleans, Louisiana, this 6th day of February, 1980.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of the Supplemental Appendix to Jurisdictional Statement, service has been made upon all parties of record.

/s/Michael J. Samanie
Counsel for Appellant